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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC

In the Matter of	)	
Amendment of Section 73.202(b),	)	MM Docket No. 00-148
Table of Allotments,	)	RM-9939
FM Broadcast Stations.	)	RM-10198
(Quanah, Texas, *et al.*)	)	

To: **Chief, Audio Division, Media Bureau**

JOINT OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION AND REQUEST FOR EXPEDITED ACTION

M&M Broadcasters, Ltd. ("M&M") and Fritz Broadcasting Co., Inc. ("Fritz"), by their attorney, hereby respectfully submit their Joint Opposition to the "Petition for Partial Reconsideration and Request for Expedited Action" filed by Rawhide Radio, LLC; Capstar TX Limited Partnership; and Clear Channel Broadcasting Licenses, Inc. (collectively "Joint Petitioners") in the above-captioned proceeding on June 16, 2003. With respect thereto, the following is stated:

1. Joint Petitioners are seeking partial reconsideration of the *Report and Order* ("*R&O*") in the above-captioned proceeding, DA 03-1533 (rel. May 8, 2003), which dismissed Joint Petitioners' Counterproposal in that proceeding due to an impermissible short-spacing to an outstanding construction permit. In essence, the Joint Petitioners are claiming that the Commission's staff somehow erred because it did not, on its own, break off a portion of the Joint Petitioners' defective counterproposal and treat it as if it had been filed correctly as a new "petition for rule making" as of the time the counterproposal was filed, more than two and one-half years earlier. For the Commission to indulge such an exercise, however, would be novel at best and clearly prejudicial to the interests of other parties.

2. As an initial matter, it must be remembered that it was the Joint Petitioners who strategically chose to file their current proposal as part of a massive Counterproposal involving some 22 communities in Texas and Oklahoma on October 10, 2000. Further, it also was the Joint Petitioners who voluntarily chose to file that Counterproposal with full knowledge that it was defective as filed. In the Counterproposal, Joint Petitioners acknowledged that the proposed channel substitution was short-spaced with the then-pending upgrade application for KNOR (now KICM(FM)), Krum, Texas (File No. BPH-20000725AAZ), but they brushed aside this fatal defect with the arrogant and complacent assertion of their expectation that the KNOR(FM) application would be dismissed. Counterproposal at 13, n.5. In point of fact, however, the application was granted on August 20, 2001.[1] Thus, it is clear that, from the very beginning of the process, the Joint Petitioners either knew or should have known that their Counterproposal was potentially subject to summary dismissal as being patently defective due to the KNOR(FM) short-spacing. Nonetheless, they chose to include the remaining portions of their proposal to the Archer City proposal and file the entire package as one enormous Counterproposal. It was the Joint Petitioners which forged the link between their current, pared-down proposal advanced in their Petition for Partial Reconsideration and the Archer City proposal, and they therefore cannot be heard to complain at this late date because the entire package which they themselves created was dismissed due to the defect which they knew to exist at the time of its filing.

3. Further, it is clear that the Joint Petitioners sought to obtain a procedural advantage for

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[1] Of course, even if the application had been dismissed, that dismissal would have come too late, as counterproposals must be technically correct at the time of their filing *Susquehanna and Hallstad, PA*, 15 FCC Rcd 24160, n.2 (Allocations Branch 2000); *Broken Arrow and Bixby, Oklahoma, and Coffeyville, KS*, 3 FCC Rcd 6507, 6511 (Allocations Branch 1988)

themselves by filing their entire package as a "counterproposal." Faced with the knowledge of the defect in the Archer City portion of their Counterproposal, the Joint Petitioners easily could have decided in October 2000 that they would file their current proposal as a separate petition for rule making at that time. Such a course of action, however, would not have afforded the same unwarranted cut-off protection (namely protection from competing proposals) that the Joint Petitioners aggressively sought to obtain by filing it as a "counterproposal" and by linking all the proposals with one that was ostensibly mutually-exclusive with the Quanah proposal that originated this proceeding.

4. While Joint Petitioners claim in their Petition for Partial Reconsideration that a counterproposal is nothing more than a rule making proposal which is mutually exclusive with another pending proposal, that is too simplistic a description. In point of fact, by filing a particular request as a "counterproposal," a proponent is afforded cut-off protection against other mutually exclusive proposals filed after a date certain established by the Notice of Proposed Rule Making triggering the filing of the counterproposal. In contrast, an initial petition for rule making does not receive any such protection against later rulemaking filings until after the Commission issues a Notice of Proposed Rule Making to establish those dates. Moreover, while the filing as an initial petition for rule making of such a large and wide-ranging proposal as that of Joint Petitioners would give other potentially interested parties in the area the opportunity to respond with counterproposals of their own (some of which might better serve the public interest), the filing of the reallotment scheme as a counterproposal would provide no such opportunity. It is therefore quite obvious why Joint Petitioners would have avoided filing their proposal as a "petition for rule making" and instead chose to file it as a "counterproposal."

Nonetheless, having made that choice, they must now live with the consequences.

5. Joint Petitioners claim, however, that the Commission should have broken off the portion of their Counterproposal which they now put forward as their Proposal and have treated that portion as a separate petition for rule making *nunc pro tunc*, *i.e.*, filed as of October 2000. In other words, Joint Petitioners are expecting the Commission's staff to salvage their defective proposal for them. It is not the responsibility of the Commission, however, to determine examine whether one portion of a massive counterproposal might be separated from the rest of that proposal; to further determine that this portion might be viable as a petition for rule making; to assume that the counterproponents would favor separating the one portion of the counterproposal in this manner; and to thereby issue a new "notice of proposed rule making" for that smaller portion of the initially filed counterproposal. To require such actions from the Commission would place tremendous burdens on the Commission's staff, including that of divining the intentions of parties filing proposals.

6. In the instant proceeding, the Joint Petitioners did later file a pleading noting that their current proposal could be treated as a separate proposal. This filing clearly was made in anticipation of the staff decision to dismiss the Counterproposal based upon the short-spacing issue.[2] The Joint Petitioners did not, however, take the further step of themselves seeking dismissal of the defective portion of their Counterproposal and the initiation of a new rule making proceeding based upon their alternative proposal. Rather, they sought to continue to

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[2] While the Joint Petitioners claim that the *R&O* in this proceeding considered the current proposal as being separate and distinct from the remainder of the Counterproposal, this statement is somewhat misleading. The only such consideration given was based upon the Joint Petitioners' filing and did not originate with the Commission's staff.

enjoy the procedural benefits of having a Counterproposal on file. Once again, having voluntarily made this choice, Joint Petitioners must accept the necessary consequences.

7. The Joint Petitioners have noted that, in some cases, the Commission has considered a counterproposal which is found not to be mutually exclusive with an original petition as a new proposal. None of the cases cited by Joint Petitioners, however, involved a situation in which the Commission has taken one portion of a defective counterproposal and treated it separately as a new petition for rule making. Rather, all of the cases involved taking a counterproposal in its entirety and treating it as a new petition. In none of these cases was there any indication that the counterproposal in question was inherently defective as initially filed. The circumstances of the instant proceeding are therefore in no way analogous to the cases cited by Joint Petitioners.

8. Likewise, the cited decisions in no way support the Joint Petitioners' claim that their current proposal should be afforded *nunc pro tunc* treatment. In each case, the counterproposal converted to separate proceeding was treated as a *new* petition for rule making, with its own separate docket. Thus, even if Joint Petitioners' counterproposal were treated as those proposals in the cases cited, there would be no significant difference between such treatment and simply having Joint Petitioners refile their proposal as a new petition for rule making.

9. Joint Petitioners further argue that their proposal should be granted *nunc pro tunc* treatment because of the allegedly unconscionable delay in action on the Counterproposal. While M&M and Fritz also find the delay in dismissal rather extraordinary in light of the Counterproposal's obvious defects, this does not mean that the equities in any way favor the Joint Petitioners. At all times, it must be remembered that it was the Joint Petitioners that elected to file such a large and complex Counterproposal that must necessary consume substantial

Commission resources for its consideration. It was the Joint Petitioners who crafted that Counterproposal to include their current proposal as part of one larger proposal. It also was Joint Petitioners that made the choice to file that Counterproposal with the full knowledge that it was defective as filed. It further was Joint Petitioners that chose to continue prosecuting the Counterproposal despite its obvious defects. Thus, it is the Joint Petitioners' own voluntary actions that have tainted the process and that should be faulted for the delay in a Commission decision. The Joint Petitioners had it in their power to end the delay at any time during the process simply by dismissing their defective Counterproposal and refiling those portions which they claim were acceptable and grantable. They cannot now be heard to complain of delay because they elected not to take this action. Likewise, Joint Petitioners cannot be afforded special treatment because of later events potentially precluding a refiling which occurred during the delay which they themselves created.[3]

10. In sum, in October 2000, Joint Petitioners put together and filed a large and convoluted Counterproposal. It was they who chose what proposals to link together in a large filing in order to obtain the procedural benefits of filing a counterproposal. Joint Petitioners made their filing at that time with the full knowledge of a defect in the key portion Counterproposal which established mutual exclusivity with the initial petition for rule making. Joint Petitioners now fault the Commission for not picking apart and recasting what they had put

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[3] It should be noted that of the eight rule making proceedings listed as conflicting with a potential re-filing, at least three (those involving Shiner, Mason, and Evant, Texas) would create no actual bar, as they involve proposals which have been dismissed by the Commission due to their conflicts with the instant proceeding. While appeals remain pending in these proceedings, pursuant to Commission policies, they nonetheless would not represent a bar to re-filing as no stays were imposed.

together and for not isolating and salvaging the portions which Joint Petitioners claim could have been granted. Their argument has no merit, however, and must be summarily rejected. The Joint Petitioners voluntarily chose to prosecute one, mammoth Counterproposal, and to continue claiming the procedural benefits inherent in counterproposal status. They now must accept the consequences of the choice made. Joint Petitioners clearly have no right to go back in time to seek to undo their own choices simply because they do not like the way that things turned out. Such a course of action would be contrary to both law and equity and would prejudice the rights of the other parties to the proceeding.

WHEREFORE, the premises considered, M&M and Fritz respectfully request that the Joint Petitioners' Petition for Partial Reconsideration and Request for Expedited Action be denied.

Respectfully submitted,

M&M BROADCASTERS, LTD.
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By: _____
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July 1, 2003

CERTIFICATE OF SERVICE

I, Dan J. Alpert, do hereby certify that true copies of the foregoing "Joint Opposition to Petition for Partial Reconsideration and Request for Expedited Action" have been served this 1st day of July, 2003, by First Class Mail, postage prepaid, upon the following:

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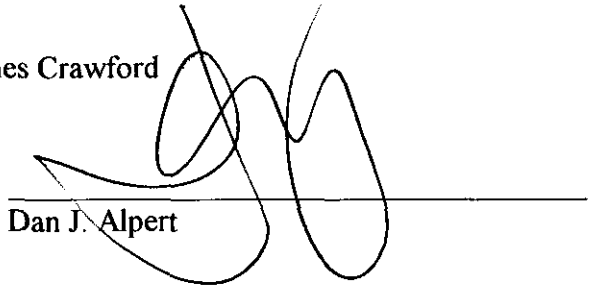

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